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**COMMENTS OF THE
DIRECTOR OF INVESTIGATION AND RESEARCH**

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ON

**THE APPLICATION OF THE *COMPETITION ACT*
TO GASOLINE PRICING ISSUES**

**THE STANDING COMMITTEE ON
NATURAL RESOURCES**

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Thank you Mr. Chairman and members of the Committee. As Director of Investigation and Research under the *Competition Act*, I welcome the opportunity to discuss with you today the application of the *Act* to gasoline pricing issues.

The Minister of Industry, the Honourable John Manley, has an active interest in this matter and he is sensitive to public concern about fluctuations in retail gasoline prices. Last year he asked me to consider whether amendments to the *Competition Act* would help address competition issues in the gasoline sector. I reported to the Minister that I did not think amendments were needed. This report, which reviews the application of the *Act* with respect to the major competition concerns vis-à-vis gas prices, was made public by the Minister. I understand a copy was forwarded to this Committee and I have additional copies with me today.

My staff continues to closely monitor gasoline markets and we will take action when we find evidence of illegal acts. I am again reviewing for the Minister whether changes are needed to the law, including some kind of whistle blower provisions, such as proposed by Mac Harb, M.P.

This morning I would like to briefly outline the nature of the *Competition Act*, in general terms, and more specifically as it applies to retail gasoline pricing issues. I would also like to announce some initiatives that I believe will make the enforcement of the law more effective.

To begin with some of the general features of the law, it is important to appreciate that the *Competition Act* is framework law. This has a number of dimensions. First, the *Act* applies across the economy, not just to particular sectors. That means that there has to be a certain balance and flexibility in the application of the law because, what may seem sensible for one sector, could have serious implications for other parts of the economy.

Second, the scheme of the *Competition Act* is that it provides a framework within which business can be carried on generally but does not prescribe or require businesses to do things or to obtain approvals. While outlawing certain practices with a view to preserving the potential for

competition, it does not try to compel firms to compete or prescribe the pricing and other decisions they take in business. In other words, it does not establish a system of administrative regulation. There is no authority provided under the *Act* to roll back prices nor does the law contain any tests with respect to the reasonableness of prices. These are matters which lie under provincial jurisdiction; the federal government does not have constitutional authority in this area.

Third, the remedies provided for in the *Act* allow the courts to either punish those who break the law or grant remedial orders to correct anti-competitive situations. The former provides both specific and general deterrence to illegal behaviour. Those who are convicted and fined or imprisoned are deterred from repeating their conduct; others, observing the levying of penalties, are encouraged to comply with the law. Similarly, the imposition of remedial orders communicates to business the types of behaviours that may potentially be struck down on competition grounds. The key point is that even though only a handful of cases are litigated every year, and each case can take a period of months, or even years, from start to finish, there can be a high level of voluntary compliance as business understands the boundaries of acceptable conduct.

I think that it is useful to understand these general features of the legislation in order to consider retail gasoline pricing issues in the proper context.

Turning to the application of the *Act* to the petroleum products sector, price fixing is often alleged when retail gasoline prices among competitors are identical or change simultaneously. There are two provisions in the *Competition Act* that are directly relevant to allegations of this nature: conspiracy (section 45) and price maintenance (section 61). Both are criminal law provisions requiring proof of the elements of the offence beyond a reasonable doubt.

While there are a number of elements that need to be shown, one of the most difficult in the context of retail gasoline pricing is evidence of agreement among competitors. If there is no evidence of agreement, or if

there is a plausible alternative explanation for identical prices or simultaneous price movements, then a prosecution will not succeed. The particular nature of the retail gas industry in Canada often affords an alternative explanation, known in the jurisprudence as conscious parallelism.

As is well known, gasoline stations communicate what they charge by posting large signs on their properties. This informs motorists and competing gas stations. Because gasoline is essentially a homogeneous product - motorists see one brand of gasoline as identical to another - gas station operators fear that if they charge a higher price than a competing station, they will lose business. For similar reasons, if they charge a lower price, they know it will be matched so that they end up making less money selling the same volume of product. Retailers that monitor their competitors and independently take action that best serves their interests are said to be engaging in consciously parallel behaviour.

This type of behaviour is legal because it falls short of agreement. While the courts may infer the existence of an agreement from circumstantial evidence, typically it requires some evidence of direct communication between the parties, threats or some such other conduct in order to prove that agreement has taken place.

My responsibility under the *Competition Act* is to uncover situations where prices are arrived at by anti-competitive means, where what is occurring is not consciously parallel behaviour but concerted action by competitors. To carry out my functions effectively, I need the cooperation of individuals and firms who have information in this regard. I will comment further about this in a moment.

Another potential form of price fixing involves a supplier of petroleum products, that does not retain ownership of the product (e.g. through consignment selling), attempting to set the price at which the product will be sold, either by "agreement, threat, promise or any like means" or by refusing to supply the product or otherwise discriminate against someone who has a policy of selling at low prices. This type of conduct may again be dealt with under the price maintenance provision (section 61). Anti-competitive

behaviour by suppliers, whether by one firm, or jointly with other suppliers, may also be subject to review under the abuse of dominant position provision of the *Act*. The price discrimination provision in the law (section 50(1)(a)) is also potentially applicable.

All of these provisions of the law are potentially powerful tools to combat anti-competitive behaviour in the retail gasoline business. They are comparable to the provisions that exist in other industrialized economies. While I am satisfied that the legislation as it presently exists provides the proper approach, a law is only as effective as the evidence one is able to assemble when a genuine contravention occurs. Rather than change the law dramatically I want to improve procedures to make sure that we are capturing all the relevant information that may disclose an offence. I am not referring to information on identical prices and simultaneous price changes which I have already explained may be the result of consciously parallel behaviour and not against the law, rather I am referring to evidence that informants and witnesses may have of communications, threats or other methods that competitors and suppliers may use to illegally influence retail prices.

In order to improve the effectiveness of the law as it now exists we will be undertaking the following actions in the coming months:

- clarifying the protections available to informants and witnesses who come forward with information disclosing potentially illegal conduct. We want to make clear that all such information is treated with the utmost confidentiality.
- establishing a program to provide recognition to those who assist in an investigation, subject to their consent.
- providing further information on exactly what type of behaviour would contravene the law.

- as part of a broader program to make more efficient the capture of information from the public, establishing a centralized complaint office with a 1-800 line.
- promoting voluntary adoption of corporate compliance programs that provide complaint mechanisms for employees who disclose potential contraventions of the *Act*.

The petroleum industry is a very important component of the Canadian economy and it is essential for both consumers and businesses that its products are produced efficiently and priced competitively. I believe the measures outlined above will enhance the prevention and detection of offences in general, and in the gasoline sector in particular.

My staff will continue to monitor this sector for compliance with the law and we encourage people with knowledge of violations of the *Act* to contact us.

I would now like to respond to some of the questions of the Committee.